



The Commonwealth of Massachusetts
Office of the Inspector General

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Meg Lusardi, Director
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Dear Ms. Lusardi:

The Massachusetts Office of the Inspector General (OIG) is writing to the Department of Energy Resources (DOER) about the U.S. Department of Energy's (USDOE) Energy Efficiency and Conservation Block Grant (EECBG) Program. The USDOE and the DOER issued EECBG funds under the American Recovery and Reinvestment Act of 2009 (ARRA). This letter offers suggestions to increase program efficiency and accountability and to reduce program risks to fraud, waste and abuse.

The OIG is reviewing ARRA-related grants and projects to identify potential vulnerabilities for fraud, waste, and abuse and other risks that could negatively impact the accountability, transparency, and anti-fraud mandates contained in the statutory language and interpretive guidance of ARRA.

This letter contains suggestions based on a review of a sample of EECBG recipients in Massachusetts.

The OIG recommends that DOER review this information for applicability to its programs. The OIG intends for these issues to assist DOER in addressing and mitigating risk and should not be construed as an outcome of any audit, investigation, or comprehensive program review of a particular recipient.

Introduction

Energy Efficiency and Conservation Block Grants (EECBG) were issued by USDOE under ARRA. The purpose of the EECBG Program is to help deploy energy efficiency and conservation technologies nationwide. Massachusetts received over \$42 million in EECBG funds, the bulk of which the USDOE granted directly to municipalities or to the Massachusetts Department of Energy Resources (DOER), which in turn subgranted these funds to municipalities.

Recipients can use EECBG funds for energy efficiency and conservation programs or projects communitywide, as well as renewable energy installations on government buildings. The USDOE's website for the EECBG Program, located at <http://www1.eere.energy.gov/wip/eeecbg.html>, states that eligible activities include the following:

- Development of an energy efficiency and conservation strategy
- Building energy audits and retrofits, including weatherization
- Financial incentive programs for energy efficiency such as energy savings performance contracting, on-bill financing, and revolving loan funds
- Transportation programs to conserve energy and support renewable fuel infrastructure
- Building code development, implementation, and inspections
- Installation of distributed energy technologies including combined heat and power and district heating and cooling systems
- Material conservation programs including source reduction, recycling, and recycled content procurement programs
- Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources
- Installation of energy efficient traffic signals and street lighting
- Installation of renewable energy technologies on government buildings
- Any other appropriate activity that meets the purposes of the program and is approved by USDOE

Based on our review, recipients in Massachusetts have used EECBG funds to develop energy conservation strategies, perform energy audits, insulate and weatherize buildings, upgrade heating systems and construct, install, and maintain solar panels, among other activities. The OIG review indicated that one of the more complicated activities involving EECBG funds is related to the development of solar panel system projects.

After reviewing the ARRA-funded grant cycle beginning in mid-2009, the OIG has identified a number of findings which are discussed in the following section.

Findings

1. Vendor Reliance: Recipients create the appearance of impropriety by relying excessively on vendors to provide technical assistance and written specifications.

Recipients have indicated to the OIG that they received technical assistance and full specifications directly from vendors that bid on energy projects. This creates a potential conflict of interest and possibly interferes with a fair and open competitive process. An energy consultant, in a conversation with the OIG, noted municipalities, more often than not, rely upon vendor advice for information pertaining to solar energy

projects, SPPAs, and their economic impact. In discussions with the OIG, DOER staff stated that they have observed similar trends with respect to municipalities seeking vendor advice for these types of projects.

While the use of vendor-supplied specifications is not prohibited, DOER should advise awarding authorities to use caution. In an advisory issued by the OIG in September 2009, entitled *Procuring Energy Efficiency and Conservation Consulting Services: Advisory for School Business Officials and Other Procurement Officials*, the OIG warned of the negative consequences from use of specifications provided by a vendor. Having a vendor draft the terms of any agreement can be a disadvantage. Vendor-supplied specifications, generally tailored for one vendor's product or service, often lead to decreased competition and increased costs. In many instances, the use of vendor supplied specifications narrows the field of competition to only one vendor resulting in what amounts to a non-competitive award under the guise of a fair and open process. An over-reliance upon vendor advice and counsel could have the same effect and could create the appearance of, if not an actual, conflict of interest situation.

Open competition in the marketplace promotes competitive pricing, fairness and maximum participation by the vendor community with respect to the provision of goods and services. When expending public funds, cost effectiveness and the integrity of the procurement process demand nothing less.

Recommendation: (a) DOER should create model specification documents to alleviate over-reliance upon vendor supplied specifications and to foster full and fair competition.

(b) DOER should advise recipients to perform due diligence before conducting procurements to find free or low cost energy services. For example, utility companies, state agencies (like DOER), and other entities offer free or subsidized energy consulting services, providing a comparable level of service to a for-profit energy management consultant, while allowing the awarding authority to take full advantage of the savings realized.

(c) DOER should advise recipients to work with an independent energy consultant prior to entering into a contract to avoid costly errors both in system design and power purchasing pricing and to ensure contract terms offer municipalities the maximum protection. In the OIG's opinion this consultant should be precluded from bidding on future contracts based on their initial work. For example, the consultant could advise whether the length of the contract is preferable to the cost per kilowatt hour of electricity. The consultant could provide guidance about the advisability of purchasing the system following the termination of the SPPA. The independent consultant could also assist in drafting non-proprietary specifications for procurements and, during the term of the contract, should be able to assist in verifying whether the jurisdiction has realized savings guaranteed under the contract.

2. M.G.L. c.25A: DOER should provide more oversight and tighter guidance for energy conservation projects with a total project cost under \$100,000 procured under chapter 25A §14.

The goal of public construction is to deliver public facilities that meet the needs of citizens and public employees who will use them and that represent sound investments of tax dollars. DOER should advise municipalities against using the exemption in M.G.L. c. 25A §14 to evade the public building construction law, the public works construction law or chapter 25A sections 11C and 11I, which cover projects with total costs over \$100,000. These laws require public advertisement of bid solicitations and prohibit public officials from splitting contracts into smaller contracts. Chapter 149 imposes severe criminal and civil penalties for violations of these provisions, including fines of up to \$10,000 and imprisonment up to 3 years. [M.G.L. c. 149, § 44J(7)]

The OIG believes that DOER and municipalities need to be mindful of the potential vulnerability that could undermine statutes created to encourage competition and ensure fair and responsible bidding. Moreover, unchecked use of an exemption to the traditional protections afforded under the public bidding laws creates a risk for fraud, waste and abuse.

The OIG found several recipients of EECBG funds that used the exemption to undertake projects that would otherwise require public bidding. The OIG is concerned that the use of the exemption could make municipalities vulnerable to fraud, waste, and abuse if used to circumvent a competitive bidding process. Public officials could take advantage of the exemption to award contracts to unscrupulous vendors, overpay for goods and services and hide these activities from public scrutiny. A few vendors could end up dominating the market for energy conservation projects, while shutting out new entrants to the market that could provide comparable products or services at a lower price.

The OIG found one municipality that used the exemption to enter into 12 separate contracts with the same contractor on the same day for different “energy conservation projects” totaling more than \$300,000. The contracts were identical except for the description of work to be performed. Under the state’s public construction bidding laws, the municipality would be required to competitively bid these projects, most likely as a single contract or several larger contracts. Instead the municipality awarded work to a single vendor valued at more than \$300,000 without competition.

If a municipality chooses to use the chapter 25A exemption, additional oversight and control measures should be imposed to ensure that an exemption to the public bidding laws does not create vulnerability to fraud, waste and abuse. An exemption from the bidding laws intended to expedite a project is not a license to ignore sound business practices and to abdicate responsibility for the appropriate and efficient use of taxpayer funds. For example, adequate analysis of vendor proposals, robust contract

management and safeguards to ensure that the jurisdiction has gotten what it paid for must be in place whether or not a competitive procurement is used.

Recommendation: The OIG believes that when using chapter 25A § 14, DOER should perform oversight to ensure that the exemption is not used for the purpose of deterring fair and open competition, and that appropriate safeguards are in place to discourage and detect fraud, waste, and abuse. The OIG further recommends that, at a minimum, DOER should advise municipalities to use sound business practices to ensure that they obtain the best value for public funds expended when using the exemption provided under chapter 25A § 14.

3. EECBG-Specific and ARRA-Specific Requirements: Some recipients failed to include EECBG-specific and ARRA-specific requirements in their SPPAs, leaving them vulnerable to fraud, waste and abuse or forfeiture of funds.

The OIG reviewed EECBG-funded SPPAs. Some of these agreements omitted important grant-specific and ARRA-specific requirements, including recordkeeping, access to records, whistleblower protections, reporting, job postings, Buy American requirements, and payment of prevailing wages under the Davis-Bacon Act. For example, one SPPA executed by a municipality and a vendor imposed no requirements on the vendor to maintain records, provide access to records, incorporate a whistleblower policy, or report project data according to the statutory requirements of ARRA.

Federal law and the grant award contract mandate that recipients follow these requirements. Failing to comply with these requirements may be a failure to comply with the grant and/or ARRA, thus allowing the federal government or the Commonwealth of Massachusetts to withhold or suspend awards or to recover any funds awarded under a contract. By including these requirements in the contract recipients will ensure compliance with the law, help eliminate potential confusion, and avoid potential contract disputes.

Sound business practices require contracts to contain provisions governing payment procedures, change orders, wages and employment, performance and payment bonds, record-keeping, financial reporting and liability insurance, among others.

Moreover, recipients of ARRA funding are required to report suspected fraud, waste, or abuse to appropriate oversight agencies. The contracts reviewed by the OIG lacked references to this requirement. The following is an excerpt from an OIG ARRA advisory released in September 2009:

If you or your firm receives federal funding either directly or indirectly to provide goods or services to the government then you may be a

“contractor.” Contractors and their employees have an obligation under federal law and regulation to report fraud, waste or abuse to federal authorities.

You may be in violation of and subject to prosecution under the Federal False Claims Act if you know of a crime and fail to report the crime. For example, if you know that the business you work for is sending invoices with false information to the government and you fail to report it, even if you did not assist with the preparation of the invoice you may be in violation of the law.

According to federal regulations, you must "timely notify" the relevant Federal Office of Inspector General (OIG) [each major federal agency has an Inspector General] whenever there is “credible evidence” that a violation of criminal law or the False Claims Act has occurred. You must disclose this evidence when you believe that fraud, bribery, gratuity, or conflict of interest violations have occurred in the award, performance, or closeout of a contract, subcontract, grant, or agreement.

Recommendation: DOER should advise recipients to include all EECBG-specific and ARRA-specific requirements in SPPAs. The OIG also recommends including the Commonwealth of Massachusetts ARRA Contract Attachment, located at http://www.mass.gov/Aosc/docs/Forms/Contracts/arra_reprt_req.doc. DOER should also advise municipalities to include the requirement that contractors report suspected fraud, waste, or abuse to appropriate oversight agencies.

4. Procurement of Construction Work Via On-Call Service Contracts: Some EECBG recipients procured new boilers or converted heating systems using on-call service contracts. This procurement method is illegal and violates M.G.L. c. 149.

The OIG reviewed several recipients that had used EECBG funds to replace aging or failed boilers, or to convert oil heat systems to gas fuel. In several instances, the recipients used existing HVAC service contracts procured under M.G.L. c. 149 to procure the new boilers.

Use of an “on-call” service contract for a boiler replacement or conversion costing \$10,000 or more is illegal and a violation of M.G.L. c. 149 §44A. Large capital improvements over \$10,000 but less than \$25,000 require three quotes. Projects estimated to cost more than \$25,000 require sealed bids in accordance with the procedures set forth in M.G.L. c.30 §39M.

An on-call contract is not for significant capital improvements, and should be for a limited number of hours of work at an hourly rate. For example, a municipality could bid an hourly rate for 150 hours of electrical work over the course of a year. The projects reviewed by the OIG had costs in excess of \$25,000, well beyond what should be

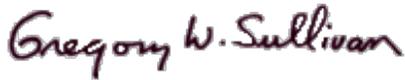
undertaken pursuant to such a contract. As a best practice, it should be stated on the face of such contracts that the contract shall not be used for expenditures of \$10,000 or more.

The OIG consulted with the Attorney General's Fair Labor Division, which interprets and enforces Chapter 149, on the use of service contracts for the procurement and installation of boilers, and that office concurs in principle with the OIG's position.

Recommendation: DOER should advise municipalities undertaking boiler replacement or conversion that on-call service contracts should not be used to procure these projects. Instead, DOER should advise these municipalities that they may use M.G.L. c. 149. Alternatively, depending on the terms of the on-call contract, they may use M.G.L. c.30B to procure the equipment and the on-call contract for the installation.

The OIG hopes this letter assists DOER in identifying the risks of the EECBG Program and protecting the integrity of ARRA spending. Please do not hesitate to contact the OIG if you have any questions, concerns, or require assistance regarding these or any other issues.

Sincerely,

A handwritten signature in dark ink that reads "Gregory W. Sullivan". The signature is written in a cursive, slightly slanted style.

Gregory W. Sullivan
Inspector General